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October 16, 2009

VIA THE COURT'S ECF SYSTEM
Honorable Esther Salas, U.S.M.J.
United States District Court
for the District of New Jersey
Martin Luther King, Jr.
Federal Building & U.S. Courthouse
50 Walnut Street
Newark, NJ 07101

**Re: *Grossbaum v. Genesis Genetics, LLC, et al.*;
Civil Action No. 07-1359(GEB)(ES)**

Dear Judge Salas:

This firm, along with Stephen N. Leuchtman, of counsel to the Trowbridge Law Firm, represents defendants Genesis Genetics Institute, LLC and Dr. Mark R. Hughes (collectively, "Genesis") in the above-referenced civil litigation. We write in response to Plaintiffs' October 13, 2009 letter to the Court, in which Plaintiffs requested that the Court reopen fact discovery.¹ Plaintiffs' request should be denied.

Relevant Procedural History

As the Court no doubt recalls, pursuant to the Court's June 10, 2009 case management order ("June 10th CMO"), fact discovery closed on August 3, 2009. On August 25, 2009, Plaintiffs wrote to the Court asking for additional time to meet the June 10th CMO's deadline for service of expert reports, which had passed 11 days earlier. Defendants objected. On September 21, 2009, the Court held an in-person status conference. On September 23, 2009, the Court issued its seventh case management order, which readjusted the expert discovery schedule in accordance with Plaintiffs' request.

At the September 21, 2009 conference, it also came to the Court's attention that although Plaintiffs had not petitioned the Court for permission to take additional fact discovery, they had mentioned this possibility to Genesis. *See Exhibit A* (Aug. 24, 2009 Letter from L. Stein to S. Leuchtman); *Exhibit B* at 14:1-11 (September 21, 2009 Transcript of Case Management Conference) (requesting deposition of Genesis's laboratory director). Genesis had refused the

¹ Plaintiffs' letter also addresses defendants' "insinuation" that plaintiff was engaged in a campaign to "burn experts." To the extent that this discussion merits a response, Genesis would like to assure the Court that it has identified its experts and is taking steps to ensure that its reports are served in a timely fashion.

Honorable Esther Salas, U.S.M.J.
Page 2

October 16, 2009

request, and the Court upheld Genesis's position, ruling that there was no way it was going to reopen fact discovery. *Exhibit A* at 4:21-5:5; *see also* 28:23-25 ("There will be no additional fact discovery taken in this case").

Nevertheless, Plaintiffs have now requested that the Court either grant their "informal application" to reopen fact discovery or allow them to file a formal motion seeking additional fact discovery. Specifically, Plaintiffs request that the Court allow them to take additional document discovery, conduct at least one additional deposition, and propound requests for admissions. Because Plaintiffs' request is both procedurally and substantively deficient, it should be denied.

Plaintiffs' Application Is Procedurally Defective And Should Be Denied

Procedurally, Plaintiffs have effectively moved for permission to file a motion for reconsideration. Local Civil Rule 7.1(i) governs motions for reconsideration in this district. It provides: "A motion for reconsideration shall be served and filed within 10 business days after the entry of the order or judgment on the original motion by the Judge or Magistrate Judge." The tenth business day after the Court's September 21, 2009 bench ruling was October 5, 2009. Yet Plaintiffs -- without explanation -- did not seek leave to reopen the fact discovery question until October 13, 2009.² Plaintiffs' failure to comply with the Local Rules, without more, is reason enough to deny their request. *See, e.g. XL Specialty Insurance Co. v. Westmoreland Coal Co.*, 2006 U.S. Dist. LEXIS 54233 (D.N.J. Aug. 4, 2006) (Brown, J.) ("Defendants failed to offer an explanation regarding why they failed to file their motion in a timely fashion, or make any request for an extension of time to file the motion beyond the ten-day limitation period set by the local rules. This alone is sufficient to deny Defendants' motion").

Plaintiffs' application to make a formal motion seeking additional fact discovery (whether styled as a motion for reconsideration or a new application) should also be denied. Plaintiffs were given the opportunity to make their record on this issue at the September 21st conference. They then followed that opportunity up with this untimely and frivolous application for reconsideration. Plaintiffs are not entitled to a third bite at the apple.

Plaintiffs' Application is Substantively Defective And Should Be Denied

Even if the Court is not inclined to deny the Plaintiffs' request due to their violation of the Local Rules, Plaintiffs' request for reconsideration of the ruling that fact discovery is now closed should be denied on substantive grounds. Local Civil Rule 7.1(i) requires Plaintiffs to set out the "matter or controlling decisions . . . which the party believes the Judge or Magistrate Judge has overlooked." Plaintiffs have not -- and cannot -- identify any matter the Court overlooked in reaching its September 21, 2009 ruling that fact discovery is -- and remains -- closed.

² Fact discovery was not addressed (except in its absence) in the Court's September 23, 2009 Case Management Order ("Sept. 23 CMO"). But even if September 23rd is the relevant date from which to compute Plaintiffs' time to move to reconsider, Plaintiffs' time elapsed on October 7, 2009.

Honorable Esther Salas, U.S.M.J.
Page 3

October 16, 2009

Plaintiffs' October 13th letter sets out three arguments in favor of reopening fact discovery. *First*, it states (incorrectly) that it was Plaintiffs' letters alone which resulted in several case management conferences, and notes that this "fact seemed to escape the Court's attention at oral argument." The argument is irrelevant. The question of which party's letters led the Court to schedule prior case management conferences is irrelevant to whether fact discovery should be reopened. Indeed, it weighs against Plaintiffs' position, as it demonstrates that Plaintiffs have the capacity and knowledge to timely petition the Court for relief when it suits them to do so. The point is that Plaintiffs never requested an extension of the August 3rd fact discovery deadline from the Court; defendants raised the issue at the September 21 conference to forestall any such application, which had been hinted at in correspondence they had received from Plaintiffs. For Plaintiffs to seek additional fact discovery at this late date makes a mockery of the Court's prior case management orders, regardless of whether those orders were the product of conferences held at the request of Plaintiffs or defendants. Furthermore, Plaintiffs made this same argument at the September 21, 2009 hearing. *See Exhibit A* at 6:19 - 7:1. Far from overlooking it, the Court found Plaintiffs' recitation of the history of past discovery disputes to be unpersuasive.

Second, Plaintiffs reiterate that they received Genesis's complete chart on May 9, 2009 and imply that because the chart was not complete earlier, this somehow entitles them to additional fact discovery now. But May 9, 2009 was a month *before* the Court issued its June 10th CMO, which closed fact discovery on August 3, 2009. Thus, Plaintiffs had all materials owing from Genesis almost three months before the close of fact discovery (and weeks before the final fact discovery deadline was set) -- yet Plaintiffs did nothing during those three months to pursue the fact discovery they now claim to so desperately need. Again, Plaintiffs' own arguments weigh in favor of denying their request.

Third, if it were really true that Plaintiffs required the guidance of experts to adequately develop the factual record, then it was incumbent upon Plaintiffs to engage their experts in time to guide fact discovery, rather than waiting until months after fact discovery closed to even identify their experts. *See Exhibit C* (Oct. 13, 2009 Letter from L. Stein to the Court) ("In this type of case with specialized and highly technical medicine, counsel depends on the experts to guide our fact investigation"). Plaintiffs' failure to develop the factual record during the fact discovery period should not be rewarded by granting them a "do-over" of their apparently inadequate factual investigation.

Genesis Should Be Awarded Its Attorneys' Fees and Costs

Finally, because Plaintiffs have once again failed to comply with the Local Rules, and because they have failed to offer a shred of new argument, a single new fact, or any new controlling authority in favor of their application for reconsideration, Genesis respectfully requests that the

Honorable Esther Salas, U.S.M.J.
Page 4

October 16, 2009

Court -- pursuant to Federal Rule of Civil Procedure 37(a)(5)(B) -- award it the attorneys' fees and costs it incurred opposing this application.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'SB', with a long horizontal flourish extending to the right.

Sarah Blaine

SB:ep

10/16/09 12800278.1

Enclosures

cc: All counsel via the Court's ECF system

EXHIBIT A

Aug. 24. 2009 4:01PM Nusbaum Stein Goldstein Bronstei

No. 2054 P. 1/1

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CERTIFIED BY THE SUPREME COURT OF
NEW JERSEY AS A
*Civil Trial Attorney
•Matrimonial Attorney
^Workers' Compensation Attorney
◻Member Florida Bar
◊Member New York Bar
+Member Pennsylvania Bar

August 24, 2009
Sent Via Fax 313-259-3474

Stephen N. Leuchtman, PC
1380 East Jefferson Avenue
Detroit, MI 48207

Re: Grossbaum v. Genesis Genetics Institute, etal

Dear Mr. Leuchtman:

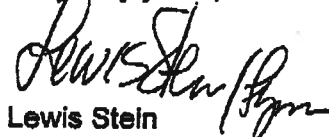
Thank you for your letter of August 19th. You are correct that we have been acutely aware of the calendar dates in the current Court Management Order. However it being August, we are on vacation two-thirds of every week during this month.

More significantly, we have been awaiting, almost daily, receipt of our expert's report. I am sure I need not remind you that plaintiff was not provided with the full and complete records of the studies performed at Genesis Genetics until approximately three months ago - after pursuing the records for a year and a half. Frankly we were only moments away from advising the US Magistrate of the circumstances concerning the delay in providing this expert report.

In addition, we have determined to seek the deposition of the Laboratory Director at Genesis Genetics which by this letter I now ask that you arrange, via a discussion with my office staff, a convenient date for this to occur.

Under separate cover we will forward a copy of our letter to the Magistrate advising of the delay in submitting the expert's report.

Very truly yours,



Lewis Stein

LS:lh

Cc: R. Scott Eichhorn, Esq. via Fax 973-618-0685
Sarah Blaine, Esq. via Fax 973-597-2400

EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAYA GROSSBAUM, et al., : Case No. 07-cv-1359 (GEB)
:
Plaintiffs, :
:
vs. :
:
GENESIS GENETIC INSTITUTE, : Newark, New Jersey
: Monday, September 21, 2009
LLC, of the State of : 2:29 p.m.
Michigan, et al., :
:
Defendants.

TRANSCRIPT OF CASE MANAGEMENT CONFERENCE
BEFORE THE HONORABLE ESTHER SALAS, U.S.M.J.

APPEARANCES:

For the Plaintiffs: LEWIS STEIN, ESQ.
(Nusbaum, Stein, Goldstein,
Bronstein & Kron, PA)
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SUCCASUNNA, NJ 07876

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1		<u>I N D E X</u>	
2		<u>9/21/09</u>	
3	<u>REVIEW OF PREVIOUS CMO</u>		<u>Page</u> 3
4	<u>ARGUMENT</u>		
5	By Mr. Stein		5
6	By Mr. Leuchtman		16
7	By Ms. Blaine		21
8	By Mr. Hamad		22
9			
10	<u>COURT DECISION</u>		24
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			

Colloquy

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1 (Proceedings begin at p.m.)

2 THE COURT: Be seated.

3 Okay. We're on the record in the matter of Grossbaum
4 v Genesis Genetics, et al., Civil Action Number -- Civil Action
5 Number 07-1359.

6 Can I have appearances of counsel please?

7 MR. STEIN: Yes. For the plaintiff, Lewis Stein of
8 Nusbaum, Stein, Goldstein, Bronstein & Kron.

9 THE COURT: For the defendants.

10 MS. BLAINE: For the defendants Sarah Blaine of
11 Lowenstein Sandler.

12 MR. LEUCHTMAN: Stephen Leuchtman of Stephen N.
13 Leuchtman, PC, appearing pro hac vice on behalf of defendants
14 Genesis Genetics and Hughes.

15 MR. HAMAD: (Telephonically) . . . Hamad from the law
16 firm of Marshall Dennehey on behalf of the NYU defendants.

17 THE COURT: All right. And Mr. Hamad is joining us
18 telephonically today due to a conflict.

19 The Court would note that I conducted an in-chambers
20 conference with the attorneys to address a series of letters
21 that I received. I would note that, indeed, discovery in this
22 case, pursuant to my last scheduling order which is dated June
23 10th, 2009, I had ordered that all fact discovery, including
24 depositions is to be concluded no later than August 3rd, 2009.
25 Plaintiff is to provide all liability and damage expert reports

Colloquy

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1 no later than August 14th, 2009. Defendants' expert reports
2 are to be served on later -- no later than October 1. And a
3 telephonic conference was to be held on Wednesday, October 7th
4 at 10:30 before this Court.

5 I would note that in light of the August 25th letters
6 and the series of letters that came thereafter, I moved up the
7 conference from the 7th of October to today to address -- to
8 address the -- the nature of these letters, in particular, Mr.
9 Stein's advising the court that he was not going to be able to
10 make the August 14th deadline that is set forth in the last
11 scheduling order that was issued in this case and that August
12 14th letter, again -- August 14th deadline, again, was for all
13 liability and damage expert reports. I only received notice
14 that, indeed, that deadline was not met through the -- the,
15 rather, August 25th letter. And that, of course, I addressed
16 off the record with counsel.

17 I would also note that I have advised counsel that
18 it's my intention to allow each side to make their respective
19 argument, however, I was going to permit Mr. Stein, over the
20 objections of defendants, additional time to submit his
21 liability and damages expert. There's also an issue that was
22 raised, apparently by Mr. Stein to a letter to counsel with
23 respect to requesting to -- to open or reopen fact discovery,
24 which as I said earlier, closed on August 3rd of this year and
25 I have already advised Mr. Stein that I am not inclined, in

Argument - Stein

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1 light of the procedural history of this case and in light of
2 the fact that, quite frankly, I have had to set a number of
3 scheduling orders in this case, that there is no way I was
4 going to reopen fact discovery, which, again, closed on August
5 3rd. And I have yet to have any formal notification of that
6 intention.

7 So, Mr. Stein, I'll let you make whatever arguments
8 you want to make, but I've pretty much indicated to decide
9 where I'm going with this one. Now it's just an issue of
10 timing and getting these reports in and allowing -- counsel has
11 already requested -- defense counsel, that is, has already
12 requested 60 days, which was the original agreement to respond
13 to any and all expert reports that are served upon them.

14 I'll hear you now, sir.

15 MR. STEIN: Thank you, Your Honor.

16 Your Honor, I don't need -- think it's necessary for
17 me to repeat everything that was said in our conference in
18 chambers; however, I would just like to point out one aspect of
19 the adherence to the discovery orders that the Court -- to the
20 management orders that the Court has entered.

21 I take note that the Court's initial scheduling order
22 was entered in, I believe, March of 2008.

23 THE COURT: No. December 12th was the original one.

24 MR. STEIN: Okay. Well, I had a second pretrial
25 scheduling order. I'm sorry, I misread that.

1 THE COURT: December 12th, '07 was the first
2 scheduling order --

3 MR. STEIN: Okay.

4 THE COURT: -- ever issued in this case.

5 MR. STEIN: All right. Then on -- on -- in March of
6 2008, I have a second pretrial scheduling order, which provided
7 that interrogatories -- the parties may serve limited 25 single
8 -- number five questions, which shall be responded to by May
9 12th of 2008. That was the Court's order.

10 I take note that on November 18th -- I have a letter
11 here, I don't know if I provided it to the Court, to Mr.
12 Leuchtman, it was a three-line letter which said that "My
13 attention is to notify Judge Salas tomorrow that we do not have
14 answers to interrogatories on behalf of the defendants Mark
15 Hughes and Genesis Genetics in the above referenced matter.
16 That letter was faxed on November 18th, 2008."

17 That's just an example of some of the delay in
18 pretrial discovery that was entered into in this case.

19 In addition to that, I have sent -- I think four
20 letters to the Court over the life of the discovery case
21 management advising the Court of the difficulties that we were
22 having in obtaining discovery in this case, indicating that,
23 first, we did not at any time disrespect the Court's orders and
24 ignore it, and at one time even expressed our concern that the
25 plaintiff should not be harmed as a result of the delays in the

1 presentation of our case.

2 Now with that background, and I think -- and I ask the
3 -- and, in fact, I sent a letter to the Court early on that I
4 was reading here, I forgot the date of it, which I -- I have
5 the date of it, in January of 2008, I sent the Court a letter
6 which I believe was a confidential letter, total pages three,
7 because I don't see any copies, it was faxed, in which I
8 summarized for the Court some of the difficulties that the
9 plaintiff was having in obtaining expertise.

10 To draw the picture here of expert, as I indicated to
11 the Court, there are only three laboratories in the United
12 States that I knew of and there may be four, which have the --
13 which do the same kind of analysis that this defendant does.
14 And we were running into a problem with getting expertise in
15 that context because when I contacted the people in Chicago --
16 there's one in Chicago, one in Detroit, one in -- and one was
17 in New Jersey at St. Barnabas. And I understand the St.
18 Barnabas Laboratory didn't do the same kind of testing
19 entirely, but they had a relationship with NYU that made it
20 improbable that NYU was going -- that they were going to be
21 available to me as an expert. But I was even -- it was even
22 suggested I might have to go to Europe.

23 We have been able to -- we have been able to get
24 consultation with Dr. Cutting, who I believe I describe to the
25 Court at one point as being the -- the director at Johns

1 Hopkins of the infertility clinic and that process, and have
2 him advise us, in view of the very specialized nature of the
3 issues connected to this case.

4 We, at the present -- and I would also only mention to
5 the Court by way of personal privilege, that for many years,
6 and since the time when the state court system was essentially
7 quiet and -- in August, I have -- I take my vacation during the
8 month of August to a home in the Berkshires, I come down two
9 days a week just to try to keep things going, but I'm away five
10 nights a week during August, so when this -- these things were
11 all happening.

12 I did not want to inject my own personal needs, but I
13 think that in light of some of the other comments that were
14 made, I think the Court should recognize in this case that the
15 last thing that we are, are disrespectful of the Court or its
16 court orders, as indicated by our numerous that we've made. We
17 work at these cases and we try to put them together and we --
18 and we appreciate that delay -- that this Court and the role of
19 the court system and the magistrate judge system is to reduce
20 the time between litigation events, so as to reduce delay in
21 connection with the courts.

22 Another personal aside, I had privilege to be at the
23 National Conference on Court Delay Reduction in Denver in 1981
24 or '2, which first set up this system of moving cases by
25 reducing the time.

Argument - Stein

9

1 So I have full respect for what you're doing, but I
2 ask the Court only to respect the fact that we -- we, too, are
3 doing our best.

4 Now here's where we're at in this case. I have -- I
5 have Dr. Cutting, and I believe as a result of a phone call I
6 had last week that I should be able to have his report, I
7 should be able to have his report within the next ten days to
8 two weeks, Dr. Cutting's report.

9 I have -- I have been advised as a result of
10 information that's come to me recently that there are -- there
11 is a wealth of knowledge about this subject matter that has not
12 been available to me, and that involves microbiologists and the
13 people who were very early on in the development of this type
14 of what we call PGD studying, that's all new and much of the
15 literature since 1998. I only this last week -- I was promised
16 two weeks ago a battery of materials that I did not have and I
17 was not exposed to, which discussed PGD testing and the
18 involvement of Dr. Hughes in the -- who is a national figure in
19 terms of producing this kind of material.

20 So I now have these materials.

21 THE COURT: Who was -- where did you get these
22 materials from? Are you saying that the defendants owed you
23 these materials?

24 MR. STEIN: No, I'm not saying -- the defendants
25 didn't owe me that material. What the defendant owed me and

Argument - Stein

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1 what we mentioned in chambers that this is -- that these pages
2 were only a small element, I can explain that to you. The
3 testing of these gene mutations is done on graphs which show
4 what's called -- and it's a very technical term, allele drop
5 out; meaning, the cells that are studied sometimes are not
6 available in the study. They drop out of the study and when
7 that happens, that increases the risk that there -- that the
8 mutation will not be identified, when they approve of the
9 embryo.

10 And so when they -- when they do these studies, they
11 do of both the father and the mother. And when they do these
12 studies, the studies are reflected in this graph of two colors.
13 Well, we didn't get -- maybe only a few pages, but we didn't
14 get from -- and I would not know this, from the defendant
15 Genesis Genetics the father's study of the -- of these genes.
16 We got only the mothers. So I was then told after Dr. Cutting
17 got the records, that you don't have the whole record and if
18 they don't -- if they didn't study the father and if they
19 didn't do appropriate work on the father's, then that's a major
20 -- it was incomprehensible that you could have his final report
21 without doing that, that's what I was told.

22 So that's why it's not an insignificant matter, what
23 they were -- what we didn't get, whether it was wilful or
24 inadvertent from Genesis Genetics. And so that's why it's --
25 we didn't get from our own expert a concrete opinion as to the

1 standard of care that was being used by the laboratory.

2 There's another issue, too. There is a strong
3 indication that Dr. Hughes did not use the state of the art
4 methodology that was being used to analyze these embryos, and
5 so we have been -- and that's what we were focusing on and the
6 -- when Dr. Hughes explained why he didn't use these things at
7 his deposition in February -- and, you know, we take a
8 deposition February 18th, we don't get the transcript back for
9 two or three weeks, so we're working in the middle of March on
10 this subject. And that's when we didn't -- that's when it
11 became important for us to have the rest of the records and
12 that's when I first began to understand some of the issues in
13 the case.

14 THE COURT: So you're telling me in March.

15 MR. STEIN: In March is the first time I began to
16 understand some of the issues, but I didn't have a complete
17 understanding of the issues until the January -- the July
18 meeting with Dr. Cutting, where I traveled to Baltimore to meet
19 with him and he explained to us what was going on.

20 In fact, even at that time he said he had to consult
21 with one of his laboratory technicians about the nature of the
22 -- of the graphs that we had.

23 So, you know, while -- it is easy for the Court to
24 look retrospectively and say you could have done this and you
25 could have done that, we're working in an area where we don't

1 always appreciate the significance of what we're getting.

2 Where does this lead us?

3 I am exposing now to the defendants a fact that --
4 that probably to their benefit, but to -- it does involve a
5 knowledge of what's going on.

6 I said there are only three laboratories in the United
7 States. I was under the impression until last week that the
8 laboratory in Chicago would provide me with an expert whose
9 name I mentioned in the letter to you, Dr. Sharitzki
10 (phonetic). I had spoken to her and she had indicated that she
11 would be available to us. But, candidly, she's not -- her
12 employer, the laboratory, said uh-uh, we're too close to Dr.
13 Hughes, we're a competitor of Dr. Hughes, we meet him on too
14 many occasions, they backed down. But I got enough -- before
15 they backed down, I got enough information about the literature
16 and other persons that I have been in contact with another --
17 the other laboratory in California, who appears to be willing
18 to -- to help us.

19 So because of the limited places we could go for
20 expertise, and it became -- that's where I'm at now with regard
21 to the liability.

22 I would hope that -- and expect that I will have -- as
23 I said, Dr. Cutting's report within two weeks. I would ask the
24 Court for 45 days to get whatever subsequent expert report
25 report I needed from -- from the laboratory in California. I

1 would ask the Court -- now I've also met -- after my meeting
2 with Dr. Cutting in July, I met with Dr. Atlas, who was the
3 treating doctor at the Cystic Fibrosis Center at Morristown
4 Memorial Hospital, who I'm confident -- I believe would give me
5 a letter within the next 30 days so I would have the treating
6 doctor's evaluation and prognosis.

7 I've also spoken to the life care planner at -- at --
8 I forgot her name, but it's a North Jersey life care planner
9 who has previous experience in cystic fibrosis. And I would
10 think that I could have her analysis and report within 60 days,
11 Your Honor.

12 And I ask for only one other --

13 THE COURT: Wait a minute. I'm trying to understand
14 even for the request that you're making. You're asking for --
15 for not 60 days from the date in which you receive other days.

16 MR. STEIN: No. Sixty --

17 THE COURT: Sixty days from --

18 MR. STEIN: -- days from today.

19 THE COURT: -- today.

20 MR. STEIN: Absolutely.

21 THE COURT: Okay.

22 MR. STEIN: Yes.

23 THE COURT: For everything?

24 MR. STEIN: For everything.

25 THE COURT: Okay.

1 MR. STEIN: And I asked for only one opportunity,
2 within the next two weeks, I would like to -- and this is not
3 an extensive request to open discovery. I indicated that I --
4 I asked for the person who -- the laboratory -- did the
5 laboratory -- was in charge of the laboratory work at Genesis
6 Genetics. I would just like to go to Detroit and take that
7 deposition so that I could fill in one -- there is one -- when
8 it was explained to me, and just last week, when -- because I
9 was trying to find out why Dr. Hughes didn't do the testing.
10 It was explained to me that there were various possibilities
11 and I wanted to go to Detroit and find that out.

12 So it's not a -- you know, as I said in my last letter
13 to you, in a lot of respects, whether it fits into the -- I
14 know the Court has guidelines and dates and God forbid a case
15 should be started in 2007, but we really didn't start a lot of
16 this case until the beginning of May of 2009. So I ask the
17 Court to be considerate in that regard, under -- taking into
18 consideration the uniqueness of the medicine that's involved in
19 this case and give us the privilege of undertaking discovery in
20 the fashion that we have.

21 And I'm sure the Court would recognize that we are not
22 and were not dilatory. The biggest piece of dilatoriness that
23 we did, as I would freely admit to having made a mistake on, is
24 not having that written that letter ten days earlier to Your
25 Honor when that last date came. And that -- you know, it was

Colloquy

15

1 August and I was otherwise occupied.

2 THE COURT: All right. The record will reflect there
3 are five -- actually, six scheduling orders that were issued in
4 this case; and then, of course, I'll hear from defense counsel.

5 The first scheduling order was issued on December
6 12th, 2007. The second scheduling order was issued on March
7 3rd, 2008. The third scheduling order was issued on June 4th,
8 2008. The fourth scheduling order, amended scheduling order
9 was issued on October 14th, 2008. The fifth amended scheduling
10 order was issued on February 19th, 2009. The sixth amended
11 scheduling order was issued on June 10, 2009.

12 And I would also note that, quite frankly, I think the
13 Court has done the exact opposite. Whenever counsel on either
14 side has expressed a problem with respect to scheduling,
15 whether, indeed, they were in receipt of all discovery and so
16 forth, I gladly entered into amended scheduling orders with the
17 parties, I gladly held conference calls. And, in fact, the
18 record will also reflect that this Court, upon notification by
19 either side made itself ready, willing, and able to address any
20 and all issues. In fact, I held a conference call on May 27th,
21 2007. I held another conference call on October 6th, 2007. I
22 held another conference call on -- on February 11th, 2009. And
23 I held another conference call on June 3rd, 2009, of which I
24 discussed with counsel that day what remained, what we needed
25 time on. And I set what I thought all counsel were in

1 agreement with, which was a -- a final scheduling order. I
2 come to find out that, indeed, it's not, that we yet again have
3 additional problems with respect to discovery.

4 But I think -- I wanted to make sure that the record
5 did reflect that this Court has entered and set six different
6 scheduling orders based on counsel's request.

7 I'll hear from you now, Counsel.

8 MR. LEUCHTMAN: Your Honor, thank you.

9 If I may, I just want to -- for the record Stephen
10 Leuchtman on behalf of Genesis and Hughes.

11 I would like to address a couple of points and then if
12 I may turn the floor over to Ms. Blaine, who has a more
13 detailed response.

14 But something came up -- if I may. Is that okay?

15 THE COURT: Absolutely.

16 MR. LEUCHTMAN: All right. Two things, and I think we
17 can probably dispose of this quickly. The last deposition
18 taken in this case was of Alexis Adler, who is an embryologist
19 at NYU, and that deposition was taken in the afternoon of July
20 13. At that time, Mr. Stein mentioned to me that he would like
21 to take the deposition of some employee of Genesis Genetics,
22 and I said, well, all right, and then I never heard anything
23 since. And this conversation -- it's the only time Mr. Stein
24 and I ever talked about any further depositions of any Genesis
25 personnel. And that conversation was held exactly three weeks

1 before the discovery cutoff. I got no letter. I got no
2 notice. I got no follow-up phone call. And I figured that we
3 had all just moved on and the discovery deadline not only came
4 and went on August 3rd, but it's very long gone.

5 The other thing -- and I'm not exactly sure what
6 context to put this in, but as Mr. Stein has been talking about
7 his contact with various experts, there is a practice that I
8 have witnessed that is disturbing to me, I've seen it happen
9 other times, where there are a limited number of experts in a
10 field. It may be, let's say, pediatric endocrinology, or some
11 very narrow subspecialty of a subspecialty, where an attorney
12 representing someone will go out and consult and there may be
13 only three or four experts available nationwide, or people at
14 least who will do forensic work. And so at least a couple of
15 which are typically hired by defendants. So plaintiffs will
16 send records to all of them, and this practice is known as
17 burning experts. And I now know that of the three or maybe
18 four people in North America who do this work, besides Mark
19 Hughes, Mr. Stein has talked to one, who begged off, and now
20 he's approached another and shared facts with that person.

21 So I'm concerned that two potential experts for the
22 defendant have been burned, have been put in a position where
23 if we go to them after we get an affirmative report, assuming
24 we ever get one, and we go to these experts and say, well, we
25 would like you to help Mark Hughes out and they say, well,

1 geeze, sorry, we ethically can't do that because we talked to
2 Lewis Stein.

3 And even on this late date, we don't know the name of
4 the lab in California or the name of the individual there who
5 does PGD, and I'd certainly at least like to know that, but I'm
6 more concerned, and this is why we think summary judgment is
7 perhaps appropriate at this juncture in this case, with the
8 fact that not only has the Court had the plaintiff's nose
9 thumbed at it, but the bridges to our potential experts have
10 been burned in the process. And at the very least, do what
11 I've already done, is state on the record that this is a major
12 concern in this case with a limited availability of experts,
13 but also ask Mr. Stein on the record, who is this lab in
14 California and who is the physician or Ph.D. who he intends to
15 potentially use as an expert. That's information that's vital
16 before we do anything else. And with that said, I'll ask that
17 the Court ask counsel for that information and then turn the
18 Court over to Ms. Blaine.

19 THE COURT: Mr. Stein, identify for the record the lab
20 in California and the physician you spoke to.

21 MR. STEIN: Yes. His name is Charles Sturm. And
22 it's --

23 THE COURT: Charles what?

24 MR. STEIN: Sturm, I believe it is, S-t-u-r-m.

25 And I'll be candid with the Court, exactly what Dr.

1 Sturm told me. Dr. Sturm said that he wants to help me;
2 however, he is chief of genetic medicine for Quest Laboratories
3 in the United States and that he would have to get permission
4 from his board to be an expert in my case. He knows -- when I
5 -- he knows about some of the problems associated with genetic
6 -- Genesis Genetics and he said if his board doesn't allow him,
7 he will give me the name of someone else connected to that
8 program and I will have it.

9 Now that conversation took place ten days ago and I
10 haven't heard back from Dr. Sturm to indicate that the board at
11 Genesis -- you know, the Quest Laboratories --

12 THE COURT: So you don't have an expert, as you stand
13 here be -- today?

14 MR. STEIN: I expect to have the name of the person
15 there who will help me, but I can't say to the Court, other
16 than that they've indicated that they will help me in a matter
17 of a week. So, you know, I would expect that I could -- it's
18 been ten days since we sent the letter out to California and I
19 expect that I would -- I didn't get a chance to call him today,
20 but I will be calling there tomorrow to find out, you know, the
21 fact that --

22 THE COURT: Wouldn't it have been prudent for you to
23 call?

24 I mean, we started this conference today at 1:30.
25 Wouldn't it have been prudent? Not only have we blown the

Colloquy

20

1 expert deadline, which was August 14th, as you stand here today
2 you're telling me you don't have an expert; and, yet, you're
3 making representations to me that you're going to be able to
4 have a report within a specified period and we still don't know
5 who the expert is.

6 MR. STEIN: Precisely -- that's correct. Precisely,
7 no. But I do know -- I do have some identification of where
8 the expert is coming from. And, frankly, I didn't choose to
9 call California before I left, 12 o'clock, to come down here --
10 until after 12 to come down here and knowing the three-hour
11 difference. It occurred to me to call California this morning,
12 but because of the time difference, I deferred on that.

13 And I would ask the Court for a matter of personal
14 privilege. There was a doctor's deposition scheduled. I
15 didn't appreciate that I had to be -- that our -- that our
16 meeting would be taking -- can I make a phone call?

17 THE COURT: Not right now.

18 MR. STEIN: Okay.

19 THE COURT: Counsel, we're in the middle of oral
20 argument --

21 MR. STEIN: All right.

22 THE COURT: -- in which I'm trying to get to the
23 bottom. I still have an oral argument on a patent case in
24 about 45 minutes, I didn't anticipate that on a status
25 conference I'd be now well into three o'clock now.

Colloquy / Argument - Blaine

21

1 So, quite frankly, I'm going to allow Miss Blaine -- I
2 have some serious reservations as to whether, indeed, any --
3 any time frame that I afford counsel in this case is going to -
4 - to be reached, in light of what I just found out, which is we
5 really don't have an identifiable expert at the -- at the
6 current moment.

7 Miss Blaine.

8 MS. BLAINE: Yes, Your Honor.

9 THE COURT: I'll hear you now. I'm going to ask
10 counsel to be brief because I am going to go ahead and set some
11 dates. And if these dates aren't met, there will be no other
12 dates offered.

13 MS. BLAINE: Yes, Your Honor.

14 MR. HAMAD: Will I have an opportunity to be heard, as
15 well, or --

16 THE COURT: Yes, Mr. Hamad, you will.

17 MR. HAMAD: Thank you.

18 MS. BLAINE: Yes, Your Honor. We just have two points
19 to make. The first point is just on the issue of the missing
20 chart that Mr. Stein has tried to make a big issue of this.
21 However, this first came up in February of 2009, it was quickly
22 remedied, we weren't aware that there was a color copy issue.
23 As soon as we were made aware that there was a color copy issue
24 in late April, we provided that in early May. And that
25 happened almost a month before the conference call that led to

1 the June scheduling order. So everybody had all of the facts
2 available to them, all of the written discovery was available
3 at that time, and we were under the impression that at that
4 time that was a final scheduling order and those dates were
5 real dates that needed to be met by all counsel. And we
6 proceeded as if that was the case.

7 The second point is that that happened, fact discovery
8 closed on August 3rd. We anticipated receiving expert reports
9 on August 14th. On August 17th, when we hadn't seen anything,
10 we sent a letter to Mr. Stein asking for the status. We did
11 not hear back from him for another week. By that point, he
12 said that he did not have experts available and he wrote to the
13 Court the next day.

14 It's now a month after that, it's September 21st, and
15 we do not have any expert reports, no dates for expert reports
16 and we believe, Your Honor, that after -- that we respectfully
17 request after six scheduling orders that at this time Your
18 Honor enter an order barring plaintiffs from producing experts.

19 THE COURT: All right. Thank you, Miss Blaine.

20 Mr. Hamad.

21 MR. HAMAD: Judge, I'll keep it very brief and simple.
22 I think while we -- I appreciate your kind order in allowing
23 Mr. Stein additional time to get his order, I must, just for
24 the record, stipulate that my client is prejudiced
25 significantly by the delay because as Mr. Leuchtman astutely

1 pointed out, we don't have an infinite number of these experts
2 out there. So if he's taking an extra two months to talk to
3 this guy and another person all over the country, we're out
4 experts and that limits our ability to defend the case for our
5 client.

6 Now with that being said, I have a couple suggestions
7 if Your Honor would be so -- if Your Honor's willing to include
8 them.

9 Now the thing I really care about, Judge, is the fact
10 that we need to know who his experts are. Now if he wants 60
11 days or 45 days to get experts and get -- Your Honor's willing
12 to do that, apparently, that's fine; however, within a certain
13 amount of -- within a week or ten days I would request that Mr.
14 Stein have the -- must identify his experts. And he can't go
15 beyond these experts. And the reason why I'd ask that, Judge,
16 is because the minute I get their CV's I want to start looking
17 to hire my own experts so that I don't blow deadlines. I would
18 request that the Court enter an order demanding that Mr. Stein
19 identify and produce CVs of any and all experts he's going to
20 call in this case regarding any and all issues, be it
21 causation, damages, or liability.

22 And last, but not least, Judge, as far as the issue of
23 -- you know, record production or discovery -- discovery
24 process in this case. I just want to stipulate for the record,
25 my client has complied. We have produced five people, very

1 busy, very well -- highly thought of people, all for
2 depositions for Mr. Stein. We have produced records. We
3 have been -- we have complied with any and all requests; and,
4 yet, here it is, it's a month after for expert reports and we
5 left here with nothing. So that's just our position.

6 THE COURT: All right. I appreciate everybody's
7 positions.

8 Here's --

9 MR. STEIN: Excuse me.

10 THE COURT: Mr. Stein, how long did you need for Mr. -
11 - your expert, Cutting's report?

12 MR. STEIN: I asked for -- well, I was hoping to have
13 it in 10 to -- 10 to 14 days. If the Court setting fixed
14 orders, then I would ask for 20 days.

15 THE COURT: And how long -- you're going to identify
16 your expert, along with the -- their CVs no later than the end
17 of business day on September 25th. That's Friday.

18 MR. STEIN: Thank you.

19 THE COURT: You have five days to do that, Mr. Stein.
20 You don't identify those experts and you will be limited to
21 those experts.

22 MR. STEIN: Thank you.

23 THE COURT: You have until September 16th to come up
24 with Dr. Cuttings' report.

25 MR. STEIN: I'm sorry, September?

1 THE COURT: I'm sorry, October 16th, rather.

2 MR. STEIN: Right.

3 THE COURT: For Cutting's report. And you have an
4 additional -- you have until November 20th to get all your
5 expert reports in. That includes your damages, the life plan
6 report, as well as any and all other reports that need to be
7 provided. All affirmative reports, the firm cutoff is November
8 20th. Counsel will have 60 days to do their responsive
9 reports; however they'll have the CVs in hand to address any of
10 Mr. Hamad's concerns by the end of this week.

11 MR. HAMAD: Thank you, Judge.

12 THE COURT: All right. And we have -- that brings us
13 to January 20th for responsive reports. And, finally, February
14 26th to depose experts.

15 MR. HAMAD: Judge, on the issue of depositions, if I
16 may be heard, I'll make it very brief.

17 THE COURT: Sure, Mr. Hamad.

18 MR. HAMAD: These experts may be all over the country
19 and I don't know about in Federal Court if the Court is so
20 inclined, but in State Court, generally, plaintiffs' experts
21 have to be deposed first, then the defense experts. If we
22 could split it up, if we can have maybe 45 days, 25 to depose
23 the plaintiffs, 25 to depose the defendants. I guess that
24 makes -- that's adds up to 50 and I said 45, obviously, you
25 know, I'm a lawyer, not a mathematician.

1 THE COURT: I am -- so what you're asking for is 20
2 days to depose plaintiffs and then what -- an additional what?

3 MR. HAMAD: Not additional. Twenty days for us -- 20
4 or 30 days for us to depose the plaintiffs' experts, maybe by
5 February 20th, and then a month for the plaintiff to depose our
6 experts.

7 MR. LEUCHTMAN: Your Honor, if I might, may I amplify
8 what Mr. Hamad has said?

9 THE COURT: Go ahead.

10 MR. LEUCHTMAN: And he makes a good point. Typically,
11 as I'm sure Your Honor knows, claims experts are deposed, the
12 depositions are transcribed, they're given to defense experts
13 and then the defendants' experts are deposed.

14 THE COURT: That's not what typically happens in
15 Federal Court, Counsel, but, okay.

16 MR. LEUCHTMAN: Okay.

17 THE COURT: At least in this district.

18 MR. LEUCHTMAN: All right. Typically, in my
19 experience, which is limited.

20 All right. Forgetting whether the deps are
21 transcribed and given to the experts, there's at least time to
22 inform the defense experts of what took place in the
23 plaintiffs' experts' deps, and I would respectfully suggest
24 that the cutoff for plaintiffs' experts' depositions be a month
25 after the January 20 --

1 THE COURT: I have February 19th for plaintiffs'
2 experts and I have March 19th for defendants' experts.

3 MR. LEUCHTMAN: Perfect. Thank you.

4 MR. HAMAD: Thank you, Judge.

5 THE COURT: Okay. We need to address dispositive
6 motions because I will not be entertaining any further
7 extensions in this case.

8 When will counsel be ready to submit dispositive
9 motions?

10 MR. HAMAD: Judge, I think if we can have a 20 days
11 after the expert depositions are concluded in order to account
12 for any potential causation arguments that may give rise to
13 motions for summary judgment motion.

14 THE COURT: Counsel, how many days after March 19th?

15 MR. HAMAD: That would be great, Your Honor.

16 MR. LEUCHTMAN: Okay. Yeah, that works for us.

17 THE COURT: All right. We have dispositive motions
18 due and owing, opening briefs, let's make it April 19th. We
19 have opposition May 3rd. And we have reply May 10th.

20 Has counsel ever engaged in settlement negotiations?

21 MR. HAMAD: No, Judge.

22 THE COURT: I take it that, indeed, we wouldn't even
23 be close to entertaining settlement negotiations until the
24 reports are done, expert reports.

25 MR. HAMAD: Judge, we don't know what the liability is

1 at this point. We don't have an idea as to what the claim is,
2 actually.

3 THE COURT: All right. Well, we're going to have
4 another conference call in any event. I'm going to make sure
5 that you all are keeping these dates and I'm going to tell
6 counsel on the record right now, I am not adjourning any of
7 these dates unless there are exigent circumstances. And
8 exigent, quite frankly, Counsel, obviously, things happen. I
9 would never want anything terrible to happen, so I won't even
10 venture to put examples of exigent circumstances on, but I
11 think the record is very clear that, indeed, this will be our
12 seventh scheduling order.

13 As I've indicated already to counsel off the record,
14 Judge Brown is now the District Judge assigned this matter. He
15 has given this case some priority in the date of -- the case
16 number is 07-1359. I have advised counsel that I have set
17 these dates. I will not deviate from these dates. And for
18 whatever reason we have non-compliance with these dates, I want
19 to know immediately, on either side.

20 I'm going to ask that -- yes, Mr. Stein.

21 MR. STEIN: Your Honor, just one other item. May I go
22 into the next three to Detroit to take that one request --

23 THE COURT: Oh, the request for -- to reopen fact
24 discovery is denied. There will be no additional fact
25 discovery taken in this case.

1 So we now have the following dates. September 25th,
2 2009, that's this Friday, by the end of business, the
3 identification of any and all experts, along with the CVs. We
4 have Dr. Cutting's reports -- report that is due on October
5 16th, '09. We have any and all other affirmative expert
6 reports due on November 20th, '09. We have responsive reports
7 due in this case by January 20, 2010. We have defendant --
8 plaintiffs' experts that must be deposed no later than February
9 19th, 2010. We have experts for the defendants that need to be
10 deposed, if, indeed, they are going to be deposed, by March 19,
11 2010. We have dispositive motions that are set for April 19th,
12 opening brief, May 3rd opposition, and May 10th reply.

13 I am going to ask that the defendants in this case do
14 the order memorializing all the dates, as well as my rulings
15 here today.

16 Anything further?

17 MR. HAMAD: No. Thank you, Judge.

18 MR. LEUCHTMAN: Your Honor, you said you wanted to
19 have a conference call and I didn't --

20 THE COURT: Oh, my law clerk will set a conference
21 call. I want to have a conference call when all reports are
22 in. So let's go ahead and have a conference call towards the
23 end of January. Jamie Lieberman, my law clerk, who is seated
24 in front of me, will come out with a day at the end of January
25 for our call. And that call is to be initiated -- who

1 initiated our last call? Does anyone recall?

2 MR. LEUCHTMAN: I think it was our responsibility, but
3 I'm not sure.

4 THE COURT: All right. Well, let's go ahead and have
5 -- Mr. Hamad, have you initiated a call yet?

6 MR. HAMAD: I don't think so, but I'll be more than
7 happy to do so, Judge.

8 THE COURT: Thank you so much. NYU -- defendant NYU
9 will initiate.

10 Thank you so much, Counsel. Have a good day.

11 MR. LEUCHTMAN: Thank you, Your Honor.

12 MR. HAMAD: Thank you, Judge.

13 (Proceedings concluded at 3:21 p.m.)

14 I, certify that the foregoing is a correct transcript
15 from the electronic sound recording of the proceedings in the
16 above-entitled matter.

17 9/30/09
Date

S / Lisa Mullen
Lisa A. Mullen
KLJ Transcription Service

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EXHIBIT C

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October 13, 2009

Via Electronic Filing & FedEx Overnight Delivery

Hon. Esther Salas, U.S.M.J.
US District Court
District of New Jersey
50 Walnut Street
Newark, NJ 07102

**Re: Grossbaum vs. Genesis Genetics, et al.
Civil Action No.: 07-CV-1359 (HAA)**

Dear Judge Salas:

[Please be advised that the electronic filing of this letter is made without exhibits attached, which are being forwarded via Federal Express overnight delivery.]

This letter will update the Court on the compliance with the Discovery Order entered on September 23, 2009 and set forth reasons why the denial of limited further fact discovery is unfair and prejudicial to the Plaintiffs. This letter also supports our informal application for reconsideration of the Court's ruling on fact discovery. Compliance with the Order of September 23rd is as follows:

1. By Friday, September 25th, the plaintiff provided the *curriculum vitae* of its experts and treating physician, namely:
 - Dr. Garry Cutting, Professor of Pediatrics and Medicine and Director of the DNA Diagnostic Laboratory, Institute of Genetic Medicine at Johns Hopkins University
 - Dr. Charles Strom, Medical Director, Genetic Testing Center, Nichols Institute, Quest Diagnostics

Hon. Esther Salas, U.S.M.J.
October 13, 2009
Page Two

- Linda Lajterman, RN, a certified life care planner of Life Care Associates
- Dr. Arthur Atlas, Director, Respiratory Center for Children at Morristown Memorial Hospital
- Dr. Matityahu Marcus, an economist

(See copy of the *curriculum vitae*s of Plaintiffs' experts annexed hereto as Exhibit A.)

2. In addition, Dr. Cutting's report (as represented to the Court as being on its way), was received, dated September 29th, and immediately forwarded to the Defendants.
3. As discussed with the Court at oral argument on September 21st, Dr. Charles Strom has now agreed to act as an expert and will be providing a report as anticipated by November 19th.

As may be recognized from a perusal of the *curriculum vitae*s of Dr. Cutting and Dr. Strom, the Court may appreciate that their areas of expertise are different: Dr. Cutting is a treating physician specialist in genetic medicine in a medical center/hospital setting and Dr. Strom is a laboratory based scientist in genetic medicine.

Needless to say, fact discovery in this case is not similar to that which occurs in the ordinary trauma case where eyewitnesses and parties offer empirical facts and circumstances usually known to both sides. In this type of case with specialized and highly technical medicine, counsel depends on the experts to guide our fact investigation. In this case, the record will show as reported in our prior correspondence to the Court, that Plaintiffs have assiduously pursued fact discovery of the Defendants (Defendant Hughes and five NYU employees in New York City) as these witness were made available by defense counsel, albeit spread over a number of months, largely due to the availability of the medical service providers. Likewise, when discovery was not forthcoming from the Defendants, it was our letters, not those of the Defendants (a fact which seemed to escape the Court's attention at oral argument) that resulted in several case management conferences and subsequent case management orders (see our letter dated September 2, 2009 annexed hereto as Exhibit B).

Hon. Esther Salas, U.S.M.J.
October 13, 2009
Page Three

For example:

Our letter to Court

Letter dated 2/21/08
Letter dated 1/22/09
Letter dated 5/6/09
Letter dated 8/25/09

Case Management Conference

3/3/08 Second Case Management Order
Conference 2/11/09
Conference 6/3/09
Conference 9/21/09

Furthermore, our letter expressly put forth my concern that delays by the Defendants prompted addressing the scheduling order would adversely affect the Plaintiff (see copy of letter to Your Honor dated January 22, 2009 annexed hereto as Exhibit C).

In addition, if the Court would further review our letter of September 9, 2009, it would be reminded that the complete chart of Genesis Genetics was not made available to the Plaintiffs until May 9, 2009, notwithstanding our numerous requests that began pre-litigation in January 2007.

My request at this time is to allow the following fact discovery:

1. A deposition of the Laboratory Director at Genesis Genetics to be taken in Detroit at any mutually convenient time hereafter;
2. Demand for documents relating to the operation of the Genesis Genetics Laboratory, licensing and accreditation; and
3. Request for admissions to eliminate the need for time-consuming proofs on facts that cannot be disputed.

One further comment is deemed appropriate on arguments of the Defendants made at oral argument and in a subsequent letter from Mr. Hamad on behalf of NYU dated September 30, 2009 insinuating that plaintiff is burning experts (see Mr. Hamad's letter annexed hereto as Exhibit D). The disingenuousness of this claim may be appreciated by the following:

- (a) The literature on this subject as reflected in the *curriculum vitae* of Dr. Strom and Dr. Cutting lists a number of co-authors who are available with similar specialties to Dr. Cutting and Dr. Strom who certainly have not been involved in consultation with the Plaintiffs;

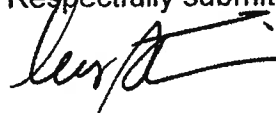
Hon. Esther Salas, U.S.M.J.
October 13, 2009
Page Four

- (b) The Defendants have not identified any attempts to gain an evaluation of the case which was refused because of Plaintiffs' prior contact. Also, the Defendant's should advise the Court whether experts have been consulted who have agreed to review the case which would certainly moot their complaint. Failing to do so renders Defendant's complaint specious; and
- (c) Enclosed is a list of clinics (see a copy of the list annexed hereto as Exhibit E), many of them university medical center based fertility clinics, where similar genetic testing (albeit except PGD) is provided to that offered by NYU throughout the United States.

While Plaintiffs attempted to contact several, there were no responses and therefore the entire field is available to the Defendants as a source of expertise. Of course it goes without saying that the merits of the defense, or the lack thereof, may have something to do with the availability of defense experts. Furthermore, Dr. Hughes is a member of the leading societies on genetic testing and PGD, both national and international which entire membership may be available to him for consultation.

Finally, if the Court is not disposed to deal with this request in the arena of an in person or telephone conference call, then we respectfully request leave to file a formal motion for which permission is required by the Court's original case management order.

Respectfully submitted,



Lewis Stein

LS:lh/svd

cc: Sarah Blaine, Esq.- via electronic filing
Stephen N. Leuchtman, Esq.- via electronic filing
Jay A. Hamad, Esq.- via electronic filing